

REMARKS/ARGUMENTS

In view of the following remarks, favorable reconsideration of the pending claims is respectfully requested.

Claims 1, 2, 4, 8, and 13-15 have been rejected under 35 U.S.C. § 103(a) as being obvious over Lukenbach.

In the rejection, the Office Action alleges that it would be obvious to modify the TiO₂ of 2-25 % disclosed in Lukenbach to be between 30-35% as recited in the instant claims. Applicants respectfully disagree with this assertions for several reasons.

First, the Office Action contends that the recitation “about 25%” encompasses the recited 30%. This is incorrect as a matter of law and fact. The percent difference between 25 TiO₂ and 30 percent TiO₂ is on the order of 20% (18.2%). This is not an insignificant or trivial difference that can be brushed aside by asserting the term “about” encompasses an increase of up to 20%. One of ordinary skill in the art would not interpret the term “about” to be so expansive, and it is improper for the Office to do so here.

Further, the Office has failed to provide any legal basis or precedent that supports construing the range to cover such an expansive increase over the ranges disclosed in Lukenbach. According to the Federal Circuit, the range of term “about” must be “interpreted in its technological and stylistic context.” See *Ortho-McNeil Pharm., Inc. v. Caraco Pharm. Labs., Ltd.*, 476 F.3d 1321, 1326 (Fed. Cir. 2007). In the present case, a study of the teachings of Lukenbach reveal that the term “about” as used in the specification should be limited to 25% or less, and should not be interpreted to disclose or suggest a range approaching 30% or greater. For example, Lukenbach states that TiO₂ is “present in the composition in the amount of from about 2% to about 25%. More preferably, it should be present in the amount of from about 2% to about 15%. Most preferably, it should be present in the amount of from about 3% to about 10%.” See column 6, lines 24-36. From these excerpts alone, it can be seen that Lukenbach actually teaches a concentration that is significantly less than 25%, and does not therefore disclose or suggest the claimed range from 30% to 35%, by weight. Lukenbach in describing his composition also states that the “specific compositions permit the use of much lower amounts of the sunscreen active ingredients than previously achievable while still achieving the desired high SPF values for the compositions and without the unsightly whiteness which occurs in prior

sunscreen compositions at concentrations above about 5%. In the sunscreen compositions of this invention, considerably higher concentrations of titanium dioxide may be used without incurring a whitening effect, e.g., even up to 15% with acceptable appearance, or possibly higher." See column 4, lines 17-22 (emphasis added). In this excerpt, Lukenbach describes that the composition can include "even up to 15%" However, one of ordinary skill in the art would interpret anything above this range as pure speculation. The explicit use of the phrase "possibly higher" reveals that anything above this range is pure speculation and that Lukenbach does not actually even teach ranges having 25% TiO₂, let alone a TiO₂ concentration of 30% or higher.

This interpretation is further reinforced by the Examples of Lukenbach. Lukenbach includes well over 100 different examples of his composition. Not a single one of Lukenbach's examples include a composition having a TiO₂ concentration above 15%, or any examples approaching 25%, let alone the claimed TiO₂ concentration of 30% to 35%. In fact, Lukenbach includes only 3 examples of the more than 100 in which the TiO₂ concentration is greater than 4.5%, and of these, only one example where the TiO₂ concentration is 15%, which is significantly lower than 25%. Thus, according to the teachings of Lukenbach, the amount of in the composition should be significantly smaller than the upper range of about 25%. As such, one of ordinary skill in the art would not read Lukenbach as embracing a range from 30 to 35% and would not consider the range disclosed in Lukenbach to be comparable to the claimed range. When considering the teachings of Lukenbach as a whole, it is clear that his teachings are contrary to such an assertion, and one of ordinary skill in the art would certainly not be motivated to modify Lukenbach to embrace such a range. If anything, one of ordinary skill in the art would interpret Lukenbach as teaching a TiO₂ concentration range on the order of 4.5%, because the Lukenbach includes well over 100 examples that have this TiO₂ concentration. In view of the clear teachings of Lukenbach, it is respectfully submitted that Lukenbach does not disclose or suggest a composition having a TiO₂ concentration of 30 to 35%. Accordingly, it is respectfully requested that the rejections based on Lukenbach be withdrawn.

With respect to Claim 2, it is also clear the Lukenbach does not disclose or suggest a composition in which the ratio between the pigments of TiO₂ and ZnO is 3:1. For example, if one was to use 30% TiO₂ as suggested by the Office Action, it would also be necessary to use 10% ZnO to achieve the recited 3:1 ratio. A reading of Lukenbach as a whole reveals that

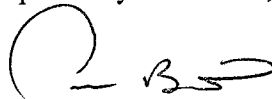
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Lukenbach considered the TiO_2 and ZnO to be equivalents (see column 4 lines 30-31), and as such, the range of 2 to 25% TiO_2 at best also encompasses the total range of the ZnO in combination with TiO_2 in the composition. Accordingly, Lukenbach does not disclose or suggest a composition in which the amount of TiO_2 is 30% and the amount of ZnO is 10% and therefore does not also disclose or suggest a composition in which the ratio between the TiO_2 and ZnO is 3:1, or a composition in which the amount of TiO_2 and ZnO is 40%, as recited in claim 3.

In view of the foregoing remarks, it is respectfully submitted that the rejections under 35 U.S.C. § 103(a) have been overcome and that the pending claims are in condition for immediate allowance.

It is not believed that extensions of time or fees for net addition of claims are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary to allow consideration of this paper, such extensions are hereby petitioned under 37 CFR § 1.136(a), and any fee required therefore (including fees for net addition of claims) is hereby authorized to be charged to Deposit Account No. 16-0605.

Respectfully submitted,



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